

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WORLDWIDE INSURANCE GROUP, formerly	:	CIVIL ACTION
known as PROVIDIAN AUTO AND HOME	:	
INSURANCE COMPANY	:	
	:	
v.	:	
	:	
JAMES PRIMAVERA and JOSEPH PRIMAVERA	:	
DANIEL DOUGHERTY and GAIL DOUGHERTY	:	NO. 99-2649

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

February 3, 2000

James Primavera ("James"), driving his father Joseph Primavera's ("Joseph") automobile without permission, collided with Daniel Dougherty's automobile, and allegedly caused injuries to Daniel Dougherty.¹ Worldwide Insurance Group ("Worldwide"), issuer of an insurance policy on Joseph's automobile, seeks a declaratory judgment pursuant to 28 U.S.C. §2201 that it is not liable for defense or damage costs related to the accident. The "permissive use" clause of Joseph's policy excludes coverage because James did not have a reasonable belief he was entitled to drive Joseph's automobile. Worldwide's motion for summary judgment will be granted.

BACKGROUND

On December 26, 1997, Joseph was driving his automobile, a 1990 Chevrolet Lumina, when the automobile experienced brake

¹ Because two defendants share a common surname, the court refers to them by their first names for clarity; the court intends no disrespect to the Messrs. Primavera in doing so.

failure and collided with a retaining wall in a local grocery store parking lot. Joseph parked the automobile and called a local auto shop to have it towed to the facility for repairs.

James took the automobile from the grocery store parking lot where it had been left by his father. James admits that he took the automobile to purchase drugs and claims that after the purchase he was going to have the automobile repaired for his father. See 9/15/99 James Primavera Deposition, p. 49.

While driving his father's automobile, James hit an automobile driven by Daniel Dougherty. Daniel and Gail Dougherty, his wife, sued James and Joseph for damages. See Dougherty, et al v. Primavera, et al, Philadelphia County Court of Common Pleas, January, 1999 Term, No. 03481.

At the time of the accident, Joseph's automobile was covered by a policy issued by Worldwide Insurance Company, formerly known as Providian Auto and Home Insurance Company. The policy defines "Insured" as "1. You or any 'family member' for the ownership, maintenance or use of any auto or trailer; 2. Any person using 'your covered auto" See Policy, p.2. The policy defines "family member" as "[a] person related to you by blood, marriage or adoption who is a resident of your household," but also states that no liability coverage will be provided for any insured if the insured is "using a vehicle without a reasonable belief that the 'insured' is entitled to do so." See Policy - Exclusion

A(8), p.2.

Worldwide alleges that James did not have a reasonable belief that he was entitled to use Joseph's automobile at the time of the accident, and seeks a determination that, given the absence of such a reasonable belief, it has no obligation under Joseph's policy to defend and/or indemnify James for the Dougherty claim. Worldwide brought this action for declaratory judgment on May 24, 1999; a default judgment for failure to appear, plead or otherwise defend has been entered against James and Joseph.

DISCUSSION

Worldwide moves for summary judgment because James did not have a reasonable belief that he had permission to use his father's automobile as a matter of law, so that Exclusion A(8) of the insurance policy releases Worldwide from liability. The issue is whether James used his father's automobile without a reasonable belief he was entitled to do so.

A court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party moving for summary judgment bears the initial burden of demonstrating, by pointing to the pleadings,

depositions or other items mentioned in Rule 56(c), the absence of facts supporting the non-moving party's claim; then the non-moving party must introduce specific, affirmative evidence illustrating that there is a genuine issue for trial. See Celotex v. Catrett, 477 U.S. 317, 322-24 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

When determining whether there is a genuine issue of material fact present in a case, the court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248.

The parties agree that if the evidence shows that James lacked a "reasonable belief" that he was entitled to use his father's automobile, Worldwide is exempt from liability. The parties dispute James's intent when he took the automobile from

the parking lot. Worldwide claims James drove the automobile, without express or implied permission, to buy drugs; Mr. and Mrs. Dougherty claim that James intended to assist his father by taking the automobile to a repair shop. See Worldwide Insurance Company's Answers to Counter-Proposed Statements of Fact, p. 1. This is a disputed issue of fact, but not a material fact. Drawing all inferences in favor of Mr. and Mrs. Dougherty, the court assumes that James was driving the automobile to have it repaired.

Even so, for coverage under the Worldwide policy, James must have had a reasonable belief that he had permission to drive the automobile. See Policy, p. 2.

Reasonable belief can be established by showing either express or implied permission to drive the automobile. There is no evidence in the record that James had any form of permission. At the time of the accident, James had a criminal record, a history of drug use, and no valid driver's license. See 9/15/99 James Primavera Deposition, pp. 7-8, 27, 30-42. Joseph had obtained a restraining order to prevent James from harassing him. See 9/15/99 James Primavera Deposition, p. 37. It is undisputed that Joseph had expressly prohibited James from using his automobile. See 12/18/98 recorded statement of Joseph Primavera; 9/15/99 Joseph Primavera Deposition, pp. 12-15; 9/15/99 James Primavera Deposition, p. 7. Consequently, a reasonable fact

finder could not conclude that James had his father's express permission to use the automobile on the day of the accident; James could not have had a reasonable belief that he had express permission to use the automobile.

A reasonable fact finder could not conclude that James had a reasonable belief he had implied permission to drive the automobile. James had not been allowed to drive his father's automobile for the past ten years. See 9/15/99 Joseph Primavera Deposition, p. 12. When asked why he did not tell his father he was going to take the automobile for repairs, James responded under oath that he knew his father would not have allowed it. See 9/15/99 James Primavera Deposition, p. 10.

Even if James mistakenly thought he would have received permission had he asked, this does not establish a "reasonable belief" that he was entitled to use the automobile. See American Mutual Ins. Co. Of Boston v. Shields, 685 F. Supp. 926, 928 (E.D. Pa. 1988). In American Mutual, Shields, a man who had been dating the sister of the insured, caused an accident while operating an automobile owned by the insured. The insurer claimed it did not have to defend Shields because he had neither express nor implied permission to use insured's automobile. The court held "permissive use" could not be implied because: 1) Shields had never driven nor been a passenger in insured's automobile; 2) Shields did not have a previous history of

borrowing or using insured's automobile; 3) Shields did not have permission from insured's sister; and 4) Shields never borrowed any automobile of insured's relatives. Even if Shields thought that, had he asked, he would have received permission to drive the automobile, there was no coverage. The court distinguished reasonable belief of entitlement to drive an automobile from reasonable belief that if one were to seek permission to drive an automobile it would have been granted. Upon proof of the former, the insurer would be liable; proof of the latter only would exempt the insurer from coverage. See also Donegal Mutual Ins. Co. v. Eyler, 519 A.2d 1005, 1009 (Pa. Super. 1987)(holding insurance company exempt from liability when brother's automobile was driven without his consent).

Mr. and Mrs. Dougherty, the non-moving parties, have not met their procedural burden; The issue is whether James had a reasonable belief he was entitled to use the automobile, but they rely solely on James's testimony that he thought he was doing something nice for his father. Mr. and Mrs. Dougherty have not met their burden of providing specific facts to show there is a genuine jury issue for trial.

CONCLUSION

There are no genuine issues of material fact; Worldwide is entitled to a declaratory judgment of non-liability for defense or damage costs related to the accident under Exclusion A(8) of

its insurance policy covering Joseph's automobile.

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INSURANCE COMPANY	:	
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v.	:	
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JAMES PRIMAVERA and JOSEPH PRIMAVERA	:	
DANIEL DOUGHERTY and GAIL DOUGHERTY	:	NO. 99-2649

ORDER

AND NOW this 3rd day of February, 2000, upon consideration of plaintiff's motion for summary judgment and defendant's response thereto, after a hearing at which counsel for all parties were heard, and in accordance with the attached memorandum, it is **ORDERED** that:

1. Plaintiff's motion for summary judgment is **GRANTED**. Worldwide Insurance Group is not liable to pay the costs of defenses or damages for an accident on December, 26, 1997, involving an automobile insured under Policy 06-SA-7076-9801.

2. The Clerk is directed to mark this case closed.

Norma L. Shapiro, S.J.